



February 5, 2016

VIA CERTIFIED PRIORITY EXPRESS MAIL

Black Dog Partnership
Kevin and Diane Jenkins
P.O. Box 2330
McKinleyville, California 95519

McKinleyville Ace Home and Garden Center
Kevin and Diane Jenkins
2725 Central Avenue
McKinleyville, California 95519

Pacific Builders
Nick Lucchesi
880 L Street
Arcata, CA 95521

RE: Notice of Violation and Intent to File Suit Under the Clean Water Act

To Whom It May Concern:

I am writing on behalf of our client, Humboldt Baykeeper ("Baykeeper"), in regard to violations of the Clean Water Act occurring at properties under the control and/or ownership of Black Dog Partnership ("Black Dog"), Kevin and Diane Jenkins, and McKinleyville Ace Hardware and McKinleyville Ace Home and Garden stores, and for work performed thereon by Pacific Builders (collectively and individually, "YOU") located at 2707 and 2725 Central Avenue, McKinleyville, California (the "Property"). By this letter, our client gives YOU notice that YOU are in violation of the Clean Water Act. If these violations outlined below are not remedied within sixty days, our client intends to commence an enforcement action against YOU, seeking civil penalties, prohibitive and mandatory injunctive relief, as well as other appropriate relief including attorneys' fees and costs. If YOU believe any of the information in this letter is incorrect, please contact the undersigned immediately.

I. Clean Water Act Background

The Clean Water Act expressly prohibits the "discharge of a pollutant" unless such discharges comply with the terms of any applicable NPDES permit, and sections 301, 302, 307, 308, and 402 of the act. 33 U.S.C. §§ 1311(a)(1), 1342. "Discharge of a pollutant" means any "addition of a pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Pollutant is defined to include "industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). A point source is "any discernable confined and discrete conveyance," 33 U.S.C. § 1362(14), and navigable waters are broadly defined as "the waters of the United States." 33 U.S.C. § 1362(7). NPDES permits include both general permits, which are



issued under 40 C.F.R. § 122.28 authorizing a category of discharges under the CWA within a geographical area, and individual permits, which are issued to specific facilities.

NPDES permits must include conditions that will ensure compliance with the CWA. At a minimum, NPDES permits must include technology-based effluent limitations, any more stringent limitations necessary to meet water quality standards, and monitoring and reporting requirements. See 33 U.S.C. §§ 1342, 1311, 1318. NPDES permits must also implement and comply with all applicable TMDLs, including the temperature and sediment TMDL adopted for the Eel River and Outlet Creek.

CWA § 402 requires each discharger to meet minimum technology-based treatment requirements. Section 402 states that all permits must meet all applicable requirements under CWA § 301. 33 U.S.C. § 1342(a)(1). Section 301, in turn, requires all discharges to achieve, at a minimum, best practicable control technology ("BPT"). 33 U.S.C. § 1311(b)(1)(a). Discharges of toxic pollutants must be treated pursuant to the best available technology ("BAT"), 33 U.S.C. § 1311 (b)(2)(A), and other pollutant discharges must comply with best conventional technology ("BCT"). 33 U.S.C. § 1311(b)(2)(E).

In addition to implementing technology-based controls, each point source discharger must achieve "any more stringent limitation necessary to meet water quality standards[.]" 33 U.S.C. § 1311(b)(1)(C). Water quality standards establish the water quality goals for a water body. 40 C.F.R. § 131.2. They serve as the regulatory basis for the establishment of water quality-based controls over point sources, as required under § 301 and § 306 of the CWA. Once water quality standards are established for a particular water body, any NPDES permit authorizing discharges of pollutants into that water body must ensure that the applicable water quality standard will be met. 33 U.S.C. § 1311 (b)(1)(C); 40 C.F.R. §§ 122.4(d), 122.4(i), 122.44(d).

Although EPA is the primary administrator of the Clean Water Act, EPA is authorized to delegate its authority to states to implement and administer the Clean Water Act. 33 U.S.C. § 1342(b). Pursuant to this provision, California has the authority to regulate discharges of pollutants by, among other actions, issuing NPDES permits to dischargers, and establishing receiving water quality standards and objectives. The State Water Resources Control Board and the nine Regional Water Quality Control Boards, including the Regional Water Quality Control Board, North Coast Region ("Regional Board") are the California agencies bearing responsibility for issuing NPDES Permit.

Federal regulations define storm water as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13). Storm water can become process wastewater if it comes into direct contact with the materials, finished product byproduct, or



waste product of a manufacturing process. *Id.* Permits issued for storm water or process wastewater discharges must meet all requirements of sections 402 and 301 of the CWA.

On July 12, 2012, the California State Water Resources Control Board (“SWRCB”) issued the statewide General Permit No. CAS000002 (“General Permit”), Water Quality Order No. 20009-0009-DWQ (as amended by 2010-0014-DWQ and 2012-006-DWQ)¹, which applies to all storm water discharges associated with construction and land disturbance activities. Any person who discharges storm water associated with construction activity in California must comply with the terms of the General Permit prior to any such discharge, or an individual NPDES Permit. To obtain coverage under the General Permit, site operators must submit a Notice of Intent (“NOI”) and must develop and implement a Stormwater Pollution Prevention Plan (“SWPPP”). Additionally, the General Permit requires permittees to obey effluent pollutant limitations prescribed by the General Permit and develop a Monitoring Reporting Program to ensure compliance as well.

The Clean Water Act also prohibits the discharge of dredged or fill materials to waters of the United States without a Section 404 Permit. 33 U.S.C. §§ 1342(a), 1344. Section 404 permits are issued and administered by the United States Army Corps of Engineers. *See* 33 C.F.R. §§ 323.1-323.6. “Waters of the United States” include a wide range of waterbodies, including “interstate wetlands,” wetlands adjacent to navigable waters, and all other waters the “degradation or destruction of which could affect interstate commerce.” 33 C.F.R. §382.2.

Among other requirements, before commencement of any activity causing the dredge or fill of materials into waters of the United States, an applicant for a Section 404 permit must demonstrate that there is no practicable alternative to the proposed discharge that would have less adverse impact on the aquatic ecosystem, and that adverse effects are avoided and/or mitigated. *See* 40 C.F.R. §§ 230.1-230.98. “[P]racticable alternatives include, but are not limited to [a]ctivities which do not involve a discharge of dredged or fill material into the waters of the United States.” 40 C.F.R. § 230.10(a)(2).

II. Property Background

According to the United States Fish and Wildlife Service National Wetlands Inventory, the Property is situated on wetlands adjacent to White Widow Creek. White Widow Creek drains into the Mad River near the Pacific Ocean. Surface water is present at these wetlands for extend periods especially early in the growing season, but is absent by the end of the growing season in most years. The water table after flooding ceases is variable, extending from saturated to the surface to a water table well below the ground surface.

¹ NPDES General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities in California (http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/constpermits/wqo2009_0009_dwq.pdf).



The Property contains multiple features that pollute the surrounding wetlands, as well as White Widow Creek, and the Mad River. A trench has been dug in an unpaved wetland area of the Property, and a sump pump is draining into wetlands and discharging pollutants into White Widow Creek.

III. Clean Water Act Violations

Point Source Discharge Without an NPDES Permit

As explained above, the discharge of any pollutant to a water of the United States is prohibited unless it is in compliance with a NPDES permit. *See* 33 U.S.C. §§ 1311(a), 1342; 40 C.F.R. § 126(c)(1). Here, YOU are and have been discharging pollutants into White Widow Creek through a sump pump, and a trench, without first obtaining coverage under a NPDES permit. A failure to comply with, or obtain coverage under a NPDES Permit is a violation of the Clean Water Act. Each time YOU discharge pollutants into White Widow Creek without a permit is a separate and distinct violation of Section 301(a) of the Clean Water Act, 33 U.S.C. §§ 1311(a), 1342; 40 C.F.R. § 126(c)(1).

Moreover, YOU have also failed to treat discharges from its unpermitted point source discharge to any applicable Clean Water Act standard, whether BAT, BCT, or BPT. As a result, discharges from the Property's unpermitted point source cause and degrade the wetlands the Property is situated on, as well as nearby White Widow Creek, and the Mad River downstream.

Noncompliance with the General Permit

A permittee under the General Permit must obey both the effluent limitations prescribed by the General Permit, as well as the SWPPP prepared and implemented by the permittee. *See* General Permit at pp. 12-13 ("Discharge Prohibitions"). Here, YOU have failed to comply with the best management practices in YOUR SWPPP that would eliminate unauthorized discharges of storm water. For example, the site plans show a bioswale on the west side of the wetland, but YOUR employees or agents have been seen recently cleaning equipment on a gravel lot where the bioswale should be.² SWPPP at Appx. 1. The site plans also depict a wetland buffer on the Property that is being encroached upon by the gravel lot on the Property. *Id.* Additionally, YOU have failed to implement the storm water drainage plan approved by the County that would contain polluted storm water and drain it away from receiving waters.³ YOUR failure to comply with YOUR own SWPPP is a violation of the General Permit and constitutes a violation of the Clean Water Act.

² Stormwater Pollution Prevention Plan, McKinleyville ACE, October 24, 2014.

³ County of Humboldt, Building Dept., July 7, 2015, Field Report for Permit No. 14-1288.



Placement of Fill into Waters of the United States

The Clean Water Act also prohibits the discharge of dredged or fill materials to waters of the United States, including wetlands, without a Section 404 Permit. 33 U.S.C. §§ 1342(a), 1344. As discussed, above, YOU have placed fill material into the wetlands the Property rests on, including gravel, without first obtaining Clean Water Act permit coverage for the dredge and fill of materials in waters of the United States. Therefore, YOU have failed to comply with the Clean Water Act's prohibition on the discharge of fill material into waters of the United States without a Section 404 Permit. 33 U.S.C. §§ 1342(a), 1344. YOU must obtain such a permit before continuing any further dredge or discharge of fill material into the wetlands the Property is situated on, including removal of the fill already illegally placed.

IV. Conclusion

Our client hereby puts YOU on notice that, after the expiration of sixty (60) days from the date of this letter, our client intends to file an enforcement action against YOU for the violations described, above. Again, to the extent that you believe any of the information in this notice letter is inaccurate, we urge that you or your representative(s) contact us at your earliest convenience. During the 60-day notice period, our client is willing to discuss effective remedies for the violations noted in this letter, and actions that might be taken to ensure future compliance with the Clean Water Act. If you wish to pursue such discussions, it is suggested that you initiate those discussions immediately.

Pursuant to Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. §19.4, each separate violation of the Clean Water Act subjects the violator to a penalty for all violations occurring during the period commencing five (5) years prior to the date of a notice of intent to file suit letter. These provisions of law authorize civil penalties of up to \$37,500 per day per violation for all Clean Water Act violations. In addition to civil penalties, our client will seek injunctive relief preventing further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), declaratory relief, and such other relief as permitted by law. Lastly, pursuant to Section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), our client will seek to recover costs, including attorneys' and experts' fees, associated with this enforcement action.

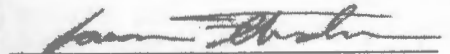
Humboldt Baykeeper is represented by the Aqua Terra Aeris Law Group in this matter. Please direct all communications to the counsel below:

Jason Flanders
Aqua Terra Aeris Law Group
409 45th Street
Oakland, CA 94609



916-202-3018
jrf@atalawgroup.com

Very truly yours,



Jason R. Flanders
AQUA TERRA AERIS LAW GROUP



SERVICE LIST

VIA U.S. CERTIFIED MAIL

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PROOF OF SERVICE

I am a citizen of the United States, employed in the County of Alameda. My business address is 409 45th Street, Oakland, CA 94609. I am over the age of 18 years and not a party to the above-entitled action. Document(s) served:

• **NOTICE OF VIOLATION AND INTENT TO FILE SUIT UNDER THE CLEAN WATER ACT**

On February 5, 2016, I served the foregoing document(s) on the parties in this action, located on the **service list, below**, by placing copies thereof in sealed envelopes addressed as shown below for service as designated below:

VIA CERTIFIED PRIORITY EXPRESS MAIL

Black Dog Partnership
Kevin and Diane Jenkins
P.O. Box 2330
McKinleyville, California 95519

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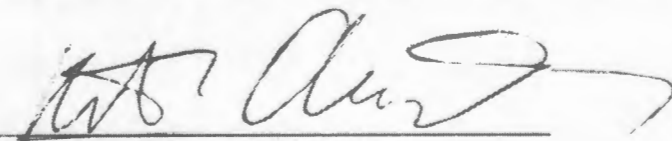
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Executive Officer
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Control Board
5550 Skylane Blvd., Ste. A
Santa Rosa, California 95403

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 5, 2016, in San Francisco, California.


Riti Chandiok